
**“THE NILE RECONSTITUTED”:
EXECUTIVE STATEMENTS, INTERNATIONAL
HUMAN RIGHTS LITIGATION, AND THE
POLITICAL QUESTION DOCTRINE**

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INTRODUCTION	295
I. BACKGROUND	298
A. <i>The Law of Deference</i>	298
1. Deference to Executive Statements	298
2. Deference and the Political Question Doctrine	300
B. <i>International Human Rights Litigation and the Recent Proliferation of Executive Intervention</i>	303
1. Recent Holocaust Litigation	303
2. Executive Statements and the Bush Administration.....	306
C. <i>Supreme Court Intervention: Sosa and Altmann</i>	309
II. RECENT APPROACHES TO EVALUATING EXECUTIVE STATEMENTS AND THEIR LIMITATIONS.....	313
A. <i>Approaches to Evaluating Executive Statements</i>	314
1. Focusing on Who Submitted the Statement	314
2. Focusing on the Thoroughness and Specificity of the Statement	314
3. Focusing on Whether the Statement Specifically Requests Dismissal	316
B. <i>Unifying Themes and Underlying Problems</i>	318
III. RECONCEPTUALIZING THE POLITICAL QUESTION DOCTRINE.....	320
A. <i>Advantages of a Balancing Test Generally</i>	321
B. <i>Filling in the Balancing Test: The Act of State and International Comity Doctrines</i>	321
1. Act of State Doctrine	321
2. International Comity Doctrine.....	324
3. Reexamining Foreign Affairs Formalism.....	327
CONCLUSION.....	329

INTRODUCTION

Over the last twenty-eight years, federal courts have witnessed a sharp rise in international human rights litigation, a development that has brought with it

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a multitude of questions surrounding the proper relationship between domestic and international law.¹ At the same time, however, these cases have prompted courts to question the relationship between the judiciary and the “political” branches of government in the realm of foreign affairs.² In doing so, courts have had to confront the ambiguity inherent in what are often vague and inarticulate doctrines of deference, generating considerable controversy in the process.³

This ambiguity has been brought into sharp focus by the Executive’s increasing tendency to submit statements to the court that either explicitly request dismissal of or express disapproval toward human-rights-related lawsuits.⁴ Prior to the twenty-first century, most presidential administrations either encouraged or refused to object to courts’ adjudication of human rights claims, allowing those courts to often evade many of the doctrinal ambiguities they might have to otherwise confront.⁵ Over the last nine years, however, lower courts have faced both an increase in the number of executive statements objecting to human rights litigation and a Supreme Court eager to

¹ See Donald J. Kochan, *No Longer Little Known but Now a Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 110-30 (2005) (describing recent litigation under the Alien Tort Claims Act); Graham O’Donoghue, Note, *Precatory Executive Statements and Permissible Judicial Responses in the Context of Holocaust-Claims Litigation*, 106 COLUM. L. REV. 1119, 1139-52 (2006) (describing recent litigation seeking reparations for Holocaust-related injuries); *infra* Part I.B (discussing human rights litigation and the Executive Branch’s response).

² See, e.g., *Separation of Powers - Foreign Sovereign Immunity - Second Circuit Uses Political Question Doctrine To Hold Claims Against Austria Nonjusticiable Under Foreign Sovereign Immunity Act.* - *Whiteman v. Dorotheum GMBH & Co.*, 431 F.3d 57 (2d Cir. 2005), 119 HARV. L. REV. 2292, 2292 (2006) [hereinafter *Separation of Powers*] (“In recent years, a wave of litigation seeking damages for grave harms committed in foreign lands has forced U.S. courts to consider the impact of their decisions in the quintessentially political realm of foreign policy.”). For a good discussion of the legal doctrine surrounding the President’s powers with relation to foreign affairs and the doctrines of judicial deference which aim to protect these powers, see generally THOMAS M. FRANCK, *POLITICAL QUESTIONS/JUDICIAL ANSWERS: DOES THE RULE OF LAW APPLY TO FOREIGN AFFAIRS?* (1992).

³ See, e.g., K. Lee Boyd, *Are Human Rights Political Questions?*, 53 RUTGERS L. REV. 277, 288-303 (2001) (critiquing recent court decisions which have dismissed human rights claims on political question grounds); Comment, *Political Question or Judicial Query: An Examination of the Modern Doctrine and Its Inapplicability to Human Rights Mass Tort Litigation*, 28 PEPP. L. REV. 849, 854 (2001) (arguing the political question doctrine is inapplicable to international human rights litigation).

⁴ See *infra* Part I.B.

⁵ See, e.g., Brian C. Free, *Awaiting Doe v. Exxon Mobil Corp.: Advocating the Cautious Use of Executive Opinions in Alien Tort Claims Litigation*, 12 PAC. RIM L. & POL’Y J. 467, 474 (2003).

accommodate these statements.⁶ As such, courts have been forced to address directly the rather awkward role executive statements play in human rights litigation.

These executive statements have naturally provoked considerable academic commentary, much of which consists of grave admonitions. Recent literature has reminded courts they are "an independent, coordinate branch of government, which must protect its powers from overreaching by the Executive Branch, a 'political' branch of government."⁷ Likewise, scholars argue the Executive should not be able to "dictate" the outcome of human rights suits,⁸ and courts should use their own judgment lest they "undermine the constitutional balance of power."⁹

Although these statements serve as valuable reminders, the question still remains as to how, as a practical matter, courts are to preserve their constitutional independence while at the same time granting executive statements due deference – two often conflicting objectives.¹⁰ A few courts have ventured some solutions,¹¹ but they often ignore the deeper doctrinal problems that seem to prevent any meaningful reconciliation between deference and independence.

⁶ See *infra* Part I.B-C.

⁷ Derek Baxter, *Protecting the Power of the Judiciary: Why the Use of State Department "Statements of Interest" in Alien Tort Statute Litigation Runs Afoul of Separation of Powers Concerns*, 37 RUTGERS L.J. 807, 808 (2006).

⁸ Free, *supra* note 5, at 469.

⁹ Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 170 (2004).

¹⁰ See *Separation of Powers*, *supra* note 2, at 2299. Increasingly more commentators have proposed potential standards under which executive statements can be analyzed. See Beth Stephens, *Judicial Deference and the Unreasonable Views of the Bush Administration*, 33 BROOK. J. INT'L L. 773, 775 (2008) ("In order to merit deference, an administration submission must: (1) articulate the relevant policy interests; (2) explain how the litigation could harm those interests; (3) tie the anticipated harm to one of the recognized foreign policy justiciability doctrines; and finally, (4) offer explanations that are reasonable, drawing conclusions that are well-founded and supported by the facts."); Margarita S. Clarens, Note, *Deference, Human Rights and the Federal Courts: The Role of the Executive in Alien Tort Statute Litigation*, 17 DUKE J. COMP. & INT'L L. 415, 431-39 (2007) (urging the creation of "a practical standard for executive deference" based upon the "specificity and foreseeability of the cost to the Executive's administration of foreign policy"); *Federal Courts - Political Question Doctrine - D.C. Circuit Declines to Overturn Lower Court's Finding of Justiciability in Tort Suit Brought by Indonesian Villagers - Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007), 121 HARV. L. REV. 898, 904 (2008) [hereinafter *Federal Courts*] (suggesting courts should disregard executive statements that only offer "vague concerns about and indirect effects on foreign relations"). Most of these approaches have focused on executive statements themselves. As discussed below, however, this Note tries to offer a more doctrinal solution that focuses upon the inherent nature of the political question doctrine. See *infra* Part II.

¹¹ See *infra* Part II.

As such, this Note takes a more doctrinal approach to the problem of executive statements by focusing more closely on the political question doctrine – the doctrine that most often governs how courts approach executive statements and has caused the most difficulty. Part I provides some background, showing how recent case law has exposed some of the ambiguity inherent in the political question doctrine. Part II describes recent attempts by lower courts to devise strategies for accommodating executive statements and argues they are too superficial. Furthermore, Part II argues the political question doctrine must be revamped if courts are going to achieve a more satisfactory resolution of the ambiguity the political question doctrine generates. Finally, Part III encourages courts to reconceptualize the political question doctrine, at least with respect to foreign affairs, by incorporating a multi-factored balancing test into the political question framework. Such a balancing test could draw from the balancing tests already contained in the act of state and international comity doctrines. Part III also explores the relationship between formalism in foreign affairs more broadly and the problem of executive statements.

I. BACKGROUND

A. *The Law of Deference*

1. Deference and Executive Statements

Whenever a pending lawsuit has the potential to affect foreign relations, courts have historically considered the Executive Branch's views (normally the State Department) in determining how to proceed with the litigation.¹² The Executive Branch can offer its views on its own initiative¹³ or a court can request that the Executive submit such a statement.¹⁴ The form such intervention takes often varies. The State Department can submit a formal "Statement of Interest" pursuant to 28 U.S.C. § 517,¹⁵ provide a brief as *amicus curiae*,¹⁶ or even submit a letter to the court.¹⁷ Likewise, some courts will

¹² See, e.g., *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1179 (C.D. Cal. 2002), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), and *withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), and *vacated pending reh'g en banc*, 499 F.3d 923 (9th Cir. 2007); Free, *supra* note 5, at 473.

¹³ See 28 U.S.C.A. § 517 (West 2008) (authorizing the Solicitor General to "attend to the interests of the United States in a suit pending in a court of the United States").

¹⁴ See, e.g., *Estados Unidos Mexicanos v. DeCoster*, 229 F.3d 332, 342 (1st Cir. 2000) (commending the district court for requesting a statement from the Executive Branch); Free, *supra* note 5, at 473 n.49.

¹⁵ 28 U.S.C.A. § 517.

¹⁶ See *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 384-85 (3d Cir. 2006).

decide to infer the views of the Executive based upon the Executive's public statements, even if those statements are not directed towards the court.¹⁸ The exact manner in which the Executive Branch decides to express its views is normally of relatively little importance, and for ease of reference, this Note uses the phrase "executive statement" to refer to all the ways in which the Executive Branch can express foreign affairs concerns to a court. While the form of an executive statement is not terribly important, it is less clear how courts should treat its substance.

Generally speaking, courts will defer to executive statements on questions of policy but not on questions of law.¹⁹ That is to say, courts will defer to the President's determination of how a case will impact foreign policy but not necessarily the legal result of that impact. The primary reason for this is that the Executive Branch has considerable constitutional authority over the formulation of U.S. foreign policy and, as a result, courts are generally wary of questioning the President's assessment of what would best advance those policies.²⁰ At the same time, however, "[i]t is emphatically the province and duty of the judicial department to say what the law is,"²¹ and if the President were able to tell courts how to decide legal questions, this would naturally create serious separation of powers concerns.²²

This dichotomy between law and policy, however, is not without qualification. For instance, although courts do defer substantially with regard

¹⁷ See, e.g., *First Nat'l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 764-65 (1972) (discussing the court's receipt of a letter submitted by the Executive informing it that the case did not threaten U.S. foreign policy interests).

¹⁸ *Banco Nacional de Cuba v. Chem. Bank N.Y. Trust Co.*, 594 F. Supp. 1553, 1563-64 (1984) ("[Courts] may, as a matter of discretion, accept the views of the State Department as communicated in any public utterance, whether it be [during the actual dispute], other litigation, or as a public announcement."). *But see Gross*, 456 F.3d at 384 (refusing to consider a letter written to a third party).

¹⁹ See, e.g., *Republic of Austria v. Altmann*, 541 U.S. 677, 701-02 (2004) (stating that questions of statutory interpretation "merit no special deference," whereas "should the State Department choose to express its opinion on the implications of exercising jurisdiction over particular petitioners in connection with their alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy"); *Doe v. Qi*, 349 F. Supp. 2d 1258, 1298 n.27 (N.D. Cal. 2004); Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649, 661-62 (2000).

²⁰ See, e.g., *Sarei v. Rio Tinto*, 221 F. Supp. 2d 1116, 1182 (C.D. Cal. 2002), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *and withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), *and vacated pending reh'g en banc*, 499 F.3d 923 (9th Cir. 2007) (explaining that "the court simply cannot delve into such matters without violating settled separation of powers principles").

²¹ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²² See, e.g., *First Nat'l City Bank*, 406 U.S. at 773 (Powell J., concurring) (arguing that the application of the act of state doctrine should not hinge entirely on communications from the Executive Branch given that "[s]uch a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine").

to how litigation might affect foreign policy, they may disregard such a statement if the Executive's opinion is in "blatant disregard of countervailing evidence."²³ Furthermore, there are some isolated instances where courts actually do defer to the President's legal conclusions.²⁴ For instance, courts will usually defer to the Executive's interpretation of customary international law given that the President's actions actually play a role in shaping the content of that law.²⁵ But when it comes to legal matters of a domestic nature, such as doctrines of judicial competence and separation of powers, courts are generally the sole arbiters of the law.²⁶

2. Deference and the Political Question Doctrine

Courts will often evaluate executive statements under the political question doctrine because this doctrine addresses the relationship between the courts and the "political" branches of government.²⁷ Although courts use executive statements when applying other doctrines of foreign affairs deference, such as the international comity and act of state doctrines,²⁸ it is the political question doctrine that often supplies the analytical framework.

Broadly speaking, the political question doctrine is "a mechanism by which a court declines to hear a case that deals with issues more properly belonging before one of the 'political' branches of government."²⁹ Although the doctrine was first articulated in *Marbury v. Madison*,³⁰ its modern formulation comes from *Baker v. Carr*,³¹ which held that a case is a nonjusticiable political question whenever one or more of six enumerated factors is "inextricable from the case at bar."³² These factors include:

²³ *Washington Post Co. v. U.S. Dep't of State*, 840 F.2d 26, 37 (D.C. Cir. 1988), *vacated*, 898 F.2d 793 (D.C. Cir. 1990); *see Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 357 (D.C. Cir. 2007) (Kavanaugh, J., dissenting) (explaining that executive statements must be "reasonable"); Free, *supra* note 5, at 483.

²⁴ *See Bradley*, *supra* note 19, at 650-54.

²⁵ *See id.* at 707-09.

²⁶ *See id.* at 720-21.

²⁷ *See Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 70 (2d Cir. 2005) ("Our inquiry into the proper deference to be accorded to the United States Statement of Interest is guided by our application of the political question doctrine because this doctrine 'reflect[s] the judiciary's concerns regarding separation of powers.'" (quoting *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995))).

²⁸ These doctrines are discussed more fully below. *See infra* Part III.

²⁹ Baxter, *supra* note 7, at 826.

³⁰ 5 U.S. (1 Cranch) 137, 165-66 (1803) ("By the constitution of the United States, the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience.").

³¹ 369 U.S. 186 (1962).

³² *Id.* at 217.

[1] textually demonstrable constitutional commitment of the issue to a coordinate political department; [2] a lack of judicially discoverable and manageable standards for resolving it; [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [5] an unusual need for unquestioning adherence to a political decision already made; [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.³³

The political question doctrine is often invoked in the foreign affairs context because courts have recognized that "the President alone has the power to speak or listen as a representative of the nation."³⁴ As a result, courts are wary of impeding upon the Executive's unique prerogatives and will naturally give considerable weight to the President's views. In particular, courts will normally use executive statements to inform the latter three *Baker* factors, particularly the "lack of respect" inquiry.³⁵ This is logical given the President is especially well placed to identify cases that will interfere with U.S. foreign policy and might therefore show a "lack of respect."

The problem, however, is that the fourth *Baker* factor is extremely vague.³⁶ Indeed, the Supreme Court has rarely touched upon the latter three *Baker* factors,³⁷ stating that the *Baker* test is "probably listed in descending order of both importance and certainty."³⁸ Generally, however, it appears as though the latter half of the *Baker* test entails something of a "foreign relations effects test," whereby courts will evaluate the degree to which litigation will interfere with foreign relations.³⁹ As the Second Circuit explained, the latter *Baker* factors apply whenever "judicial resolution of a question would contradict prior decisions taken by a political branch in those limited contexts where such contradiction would seriously interfere with important governmental interests."⁴⁰ Therefore, any statement offered by the State Department as to

³³ *Id.*

³⁴ *See, e.g.,* United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 319 (1936).

³⁵ *See* Jack L. Goldsmith, *The New Formalism in United States Foreign Relations Law*, 70 U. COLO. L. REV. 1395, 1401-02 (1999).

³⁶ *See, e.g.,* *Federal Courts*, *supra* note 10, at 903.

³⁷ *See* Alperin v. Vatican Bank, 410 F.3d 532, 545 (9th Cir. 2005) (referring to the "disproportionate emphasis on the first two tests in both Supreme Court and lower court cases").

³⁸ *Vieth v. Jubelirer*, 541 U.S. 267, 278 (2004); *cf. Separation of Powers*, *supra* note 2, at 2298-99.

³⁹ *See* Goldsmith, *supra* note 35, at 1396, 1401-02; *Federal Courts*, *supra* note 10, at 904.

⁴⁰ *Kadic v. Karadzic*, 70 F.3d 232, 249 (2d Cir. 1995). It is questionable whether the fourth *Baker* factor actually requires an explicit "prior decision" that needs to be

how litigation might impact foreign relations would be extremely probative. At the same time, however, the Supreme Court in *Baker* cautioned that “it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance,”⁴¹ a view later reiterated by the Court in *Japan Whaling Ass’n v. American Cetacean Society*.⁴² As a result, it would seem that the Executive’s views should not be dispositive and that there still must be some independent judgment on the part of the judiciary. As the Second Circuit observed in *Kadic v. Karadzic*, “an assertion of the political question doctrine by the Executive Branch . . . would not necessarily preclude adjudication.”⁴³ This, of course, is consistent with the above-mentioned view that courts should ultimately decide questions of law.⁴⁴

Thus, a court evaluating an executive statement would be in something of a quandary. On the one hand, a court would have to defer to the President’s policy determinations, and yet these policy determinations would themselves seem to control the application of the political question doctrine. After all, to the degree the latter three *Baker* factors revolve around questions of foreign policy, an executive statement would have enormous weight. At the same time, however, a court would have to ensure that, in deferring to the President’s policy conclusions, it was not allowing those policy conclusions to dictate the application of the political question doctrine. And yet, because the Supreme Court has spent so little time explaining what the second half of the *Baker* framework actually means, it remains unclear what substance the political question doctrine has beyond such a policy conclusion or what other factors should be incorporated into the analysis.⁴⁵

Despite these doctrinal ambiguities, the problem of deference to executive statements did not generate considerable controversy prior to the twenty-first

contradicted. Indeed, there is no reason to think that a prior decision is essential for there to be a “lack of respect”; if anything, one would think such an eventuality is covered by the fifth and sixth factors, both of which specifically address contradicting the Executive. In fact, even the Second Circuit has applied the “prior decision” requirement rather loosely when dealing with the fourth *Baker* factor. See *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 73 (2d Cir. 2005) (dismissing the case under the fourth *Baker* factor despite the lack of an express contradiction); *Separation of Powers*, *supra* note 2, at 2298.

⁴¹ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

⁴² 478 U.S. 221, 230 (1986) (quoting *Baker*, 369 U.S. at 211); *cf.* Goldsmith, *supra* note 35, at 1427-28 (arguing that *Japan Whaling* represented a shift towards a more formalistic application of the political question doctrine whereby courts are not supposed to dismiss cases merely because they think litigation might interfere with foreign relations).

⁴³ *Kadic*, 70 F.3d at 250. Numerous scholars have concurred in this conclusion that executive statements should not be dispositive. For a sampling, see *supra* notes 7-9 and accompanying text.

⁴⁴ See *supra* notes 19-26 and accompanying text.

⁴⁵ See *Federal Courts*, *supra* note 10, at 904 (explaining that the *Baker* test “entails a difficult determination of the point at which interference threatens the separation of powers”).

century. One reason for this was because there was simply less executive intervention to which courts had to defer. Prior to the George W. Bush Administration, intervention in human rights litigation was more sporadic, and when it did occur, it was often to encourage litigation.⁴⁶ As a result, until recently, courts were largely able to avoid thorny questions surrounding deference to executive statements, touching upon them briefly only as a matter of dictum.⁴⁷ Recently, however, this has begun to change as requests for dismissal have become more common, and the doctrinal ambiguities underlying executive deference have become much starker.

B. *International Human Rights Litigation and the Recent Proliferation of Executive Intervention*

During the last eight years there has been a sharp increase in the number of statements issued by the Executive Branch that have requested the dismissal of pending litigation. This can be primarily attributed to two separate and largely independent causes, both of which relate to the ongoing evolution of international human rights litigation. The first has to do with a recent increase in litigation brought by Holocaust survivors and the various negotiations between the United States and European governments aimed at achieving a non-judicial resolution of such claims.⁴⁸ The second pertains to the George W. Bush Administration's opposition towards human rights litigation brought under the Alien Tort Claims Act ("ATCA").⁴⁹ These two developments have placed considerable strain on the political question doctrine – thereby highlighting the doctrinal ambiguities outlined above.

1. *Recent Holocaust Litigation*

During the late 1990s there was a rise in litigation aimed at collecting damages for harms suffered due to the Nazi appropriation of Jewish property

⁴⁶ See, e.g., *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in Amministrazione Straordinaria*, 937 F.2d 44, 49-50 (2d Cir. 1991) ("[G]iven the fact that both the Executive and Legislative Branches have expressly endorsed the concept of suing terrorist organizations in federal court, resolution of this matter will not exhibit 'a lack of the respect due coordinate branches of government.'" (citations omitted)); *Millen Indus., Inc. v. Coordination Council for N. Am. Affairs*, 855 F.2d 879, 882 (D.C. Cir. 1988) (quoting the State Department as saying, "there are no foreign policy interests of the United States in our present relations in the Far East that should bar adjudication of the present suit"); Free, *supra* note 5, at 474-75 (commenting that, at least within the context of the Alien Tort Claims Act, Presidents prior to George W. Bush rarely raised foreign policy concerns regarding pending litigation, and in fact sometimes encouraged such suits).

⁴⁷ See *Kadic*, 70 F.3d at 250 (stating that if the Executive were to request dismissal under the political question doctrine, this would be "entitled to respectful consideration," though declining to elaborate further given that no such statement had been issued).

⁴⁸ See *infra* Part I.B.1.

⁴⁹ See *infra* Part I.B.2.

during World War II.⁵⁰ In response, the Clinton Administration entered into executive agreements with France, Germany, and Austria during 2000 and 2001.⁵¹ These agreements did not dismiss any pending litigation, but rather, established an independent tribunal specifically for the resolution of Holocaust claims.⁵² As part of the agreements, the U.S. Government agreed to submit a statement in all pending and future Holocaust-related litigation requesting that the case be dismissed. For instance, in the German Foundation Agreement, the Executive was to inform the court that “dismissal of the lawsuit, which touches on the foreign policy interests of the United States, would be in the foreign policy interests of the United States”⁵³ and to also “recommend dismissal on any valid legal ground.”⁵⁴

These agreements have perhaps had their most dramatic effect in the federalism context. In *American Insurance Ass’n v. Garamendi*,⁵⁵ the Supreme Court struck down a California law that required insurance companies to disclose details regarding the policies they issued between 1920 and 1945.⁵⁶ The Court found the statute was preempted by the “express foreign policy of the National Government,” reflected in the Executive Agreements, even though there was no statute or treaty.⁵⁷ In doing so, the Court significantly enlarged the scope of its federal preemption jurisprudence.⁵⁸

As for relations between coequal branches of the federal government, however, these agreements have had more complex implications – especially with regard to the political question doctrine. In particular, there has been some confusion as to how exactly courts should treat the statements submitted by the Executive pursuant to these agreements. Before these executive agreements had been concluded, U.S. courts began dismissing Holocaust claims on their own initiative, finding the suits constituted, among other things, nonjusticiable political questions.⁵⁹ In none of these cases, however, did the Clinton Administration intervene, and the courts instead based their conclusions primarily on various post-World War II treaties.⁶⁰ After these executive agreements were established, however, the Executive Branch

⁵⁰ O’Donoghue, *supra* note 1, at 1124-28.

⁵¹ *Id.*

⁵² *Id.* at 1128-29.

⁵³ *Id.* at 1163 (quoting Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., Annex B, July 17, 2000, 39 I.L.M. 1298).

⁵⁴ *Id.* (quoting Agreement Concerning the Foundation “Remembrance, Responsibility and the Future,” U.S.-F.R.G., Annex B, July 17, 2000, 39 I.L.M. 1298).

⁵⁵ 539 U.S. 396 (2003).

⁵⁶ *Id.* at 409.

⁵⁷ *Id.* at 420.

⁵⁸ K. Lee Boyd, *Universal Jurisdiction and Structural Reasonableness*, 40 TEX. INT’L L.J. 1, 24-25 (2004).

⁵⁹ See, e.g., *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 485 (D.N.J. 1999); *Burger-Fischer v. Degussa AG*, 65 F. Supp. 2d 248, 282-85 (D.N.J. 1999).

⁶⁰ See O’Donoghue, *supra* note 1, at 1140.

became more proactive in seeking to have these cases be dismissed. As a result, courts have had to determine how to incorporate executive statements into the political question analyses.⁶¹ In doing so, courts confronted many of the doctrinal ambiguities discussed above.

Take, for example, *Frumkin v. JA Jones, Inc.*,⁶² one of the first cases to explore the implications of these statements. In *Frumkin*, the district court explained "the Statement of Interest is non-binding on the Court."⁶³ This was a sensible conclusion given the statement did not purport to settle any claims, nor were its legal conclusions entitled to any special deference.⁶⁴ Therefore, the statement merely provided evidence that litigation would interfere with foreign relations. Nonetheless, even if the court did not view the statement as being formally dispositive, it may as well have been. Indeed, the court went so far as to state that if the statement did not "clearly demonstrate that the claims against German Industry presently before the Court constitute political questions best left to the political branches, it is unclear to the Court what would."⁶⁵ Of course, the court did not rely merely upon the executive statement, but also referenced the executive agreements as well as the extensive history of post-war treaties and negotiation.⁶⁶ Nonetheless, the language used by the court seemed to suggest that, in certain circumstances, the policy representations of the Executive Branch could have a controlling impact on the political question doctrine.

Other courts have avoided the high degree of deference to which the *Frumkin* court seemed to lean, but have been no more successful at offering a framework with which to evaluate such statements. In *Ungaro-Benages v. Dresdner Bank AG*,⁶⁷ the Eleventh Circuit addressed a similar Holocaust claim, ultimately finding the political question did not bar the suit.⁶⁸ In doing so, the court found that the executive statement was not compelling, cautioning that "[a]lthough the executive's statement of interest is entitled to deference, it does not make the litigation non-justiciable."⁶⁹ Yet the court did not explain the nature of the deference to which the statement was entitled. Rather, it simply concluded by stating that the "statement of interest from the executive is entitled to deference and we give the executive's statement such deference in our international comity analysis."⁷⁰ The Eleventh Circuit's solution,

⁶¹ *Id.* at 1139-40 (remarking that the agreements lent weight to the court's prior determination that Holocaust reparations were for the political branch).

⁶² 129 F. Supp. 2d 370 (D.N.J. 2001).

⁶³ *Id.* at 380.

⁶⁴ See O'Donoghue, *supra* note 1, at 1120.

⁶⁵ *Frumkin*, 129 F. Supp. 2d at 389.

⁶⁶ *Id.* at 382-84.

⁶⁷ 379 F.3d 1227 (11th Cir. 2004).

⁶⁸ *Id.* at 1235.

⁶⁹ *Id.* at 1236 n.12.

⁷⁰ *Id.* at 1236.

therefore, was to give the statement no deference with regard to its political question analysis. This, however, was hardly a more satisfactory solution given the importance of deferring to the Executive's evaluation of foreign policy interests – interests which the political question doctrine seems to accommodate.

Subsequent Holocaust cases have done little to resolve the questions left open by *Frumkin* and *Ungaro-Benages*. Rather than offer clarifications as to how courts should treat executive statements, most recent decisions have been able to sidestep the matter entirely. For instance, in *Whiteman v. Dorotheum GmbH & Co. KG*,⁷¹ the Second Circuit analyzed an executive statement at length, but then narrowly limited its holding to the facts of that case.⁷² Nor is this reluctance to tease out the relationship between executive statements and the political question doctrine surprising. The fact is that executive statements are but one piece of an exceedingly complex history of diplomacy and negotiation surrounding Holocaust claims. As a result, courts do not have to rely upon these statements exclusively in finding such disputes nonjusticiable. Still, cases such as *Frumkin* and *Ungaro-Benages* suggest that outside the unique context of Holocaust litigation, executive statements can present some confusion as to how the foreign policy interests asserted by the U.S. government can exist within the political question framework.

2. Executive Statements and the Bush Administration

The policy goals of the George W. Bush Administration have also contributed to a recent rise in executive statements requesting dismissal, and here courts have been less capable of escaping the questions that *Whiteman* and similar cases have been able to sidestep. Generally speaking, the Bush Administration opposed most international human rights litigation.⁷³ In particular, it was hostile towards claims brought under the Alien Tort Claims Act,⁷⁴ a statute that was originally passed in 1789.⁷⁵ The ATCA gives federal courts jurisdiction over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”⁷⁶ Although the statute remained dormant for most of its history, in 1980 the Second Circuit breathed new life into it by holding that the ATCA did not apply just to international law violations that existed in 1789, but also to norms that had

⁷¹ 431 F.3d 57 (2d Cir. 2005).

⁷² *Id.* at 73 (stressing that “we defer to a United States statement of foreign policy interests in this particular case”); see *Separation of Powers*, *supra* note 2, at 2298-99.

⁷³ See generally Stephens, *supra* note 9.

⁷⁴ 28 U.S.C. § 1350 (2000).

⁷⁵ Baxter, *supra* note 7, at 809.

⁷⁶ *Id.*

evolved over time – such as the prohibition against torture.⁷⁷ This, in turn, triggered a wave of litigation over the last twenty-eight years seeking recovery for a variety of human rights violations.⁷⁸ Although originally the defendants in these cases were government officials, increasingly more multinational corporations have been brought into court under this statute.⁷⁹

The Bush Administration, however, has sought to limit the scope of the ATCA.⁸⁰ The best example of this came in the 2004 case of *Sosa v. Alvarez-Machain*,⁸¹ where the government intervened and unsuccessfully argued the ATCA did not allow plaintiffs to bring claims for violations of international law unless Congress specifically passed an additional statute to that effect.⁸² However, the Administration also opposed the application of the ATCA on a more ad hoc basis by regularly submitting statements requesting these suits be dismissed due to their impact upon foreign relations.⁸³ This course of action was in contrast to previous administrations, which had either encouraged or at least refused to impede ATCA litigation.⁸⁴

These statements, although similar to those seen with regard to Holocaust litigation, are notably bolder. With Holocaust litigation, there was normally an extensive history of treaties and international negotiation which bolstered findings of nonjusticiability, regardless of whether a statement was issued.⁸⁵ The Bush Administration's ATCA statements, by contrast, were normally submitted where there was little beyond the statement to suggest that the case should be dismissed on political question grounds.⁸⁶ As such, one might

⁷⁷ *Filartiga v. Pena-Irala*, 630 F.2d 876, 881 (2d Cir. 1980) (“[C]ourts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.”); *Baxter*, *supra* note 7, at 809-10.

⁷⁸ *Baxter*, *supra* note 7, at 810. Although this sounds similar to the Holocaust litigation mentioned above, in fact, much of the Holocaust litigation has been brought by American citizens and, therefore, has not invoked the ATCA. *See, e.g.*, *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232 n.7 (11th Cir. 2004) (“As an American citizen, the plaintiff cannot rely on the Alien Tort Claims Act and there is no alternative statement from Congress expressing its intent to recognize this cause of action.”).

⁷⁹ *See Baxter*, *supra* note 7, at 810-11.

⁸⁰ *See Stevens*, *supra* note 9, at 169.

⁸¹ 542 U.S. 692 (2004).

⁸² *Id.* at 712.

⁸³ *See Stephens*, *supra* note 9, at 191; *see also Baxter*, *supra* note 7, at 811 (“After failing in its vigorous effort to seek the annulment of the statute, claiming in the *Sosa v. Alvarez-Machain* case that it was a mere ‘stillborn’ statement of jurisdiction, the Bush Administration now routinely submits statements of interest to judges in particular [ATCA] cases.”).

⁸⁴ *Free*, *supra* note 5, at 474-75.

⁸⁵ *See supra* Part I.B.1.

⁸⁶ *See Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1082 (9th Cir. 2006), *withdrawn and superseded on reh’g in part*, 487 F.3d 1193 (9th Cir. 2007), and *vacated pending reh’g en banc*, 499 F.3d 923 (9th Cir. 2007) (remarking that “without the [statement of interest],

expect courts would therefore be more cautious in evaluating them. However, in the district court's opinion in *Sarei v. Rio Tinto PLC*,⁸⁷ the first decision to evaluate the Bush Administration's statements, the court struggled with the same doctrinal ambiguities witnessed in the Holocaust litigation.⁸⁸

In *Sarei*, a group of Bougainvillian⁸⁹ citizens brought an ATCA suit against a mining corporation alleging a variety of claims, including environmental damage and human rights violations.⁹⁰ At the request of the court, the State Department submitted an executive statement claiming the litigation "would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations."⁹¹ Based upon this statement, the court concluded that the political question doctrine warranted dismissal of all claims.⁹²

In so ruling, the court again demonstrated the conceptual confusion surrounding how executive statements interact with the political question doctrine. As is the norm, the court accepted the Executive's conclusions regarding the impact the case would have on foreign policy,⁹³ but as in

there would be little reason to dismiss this case on political question grounds"); Aron Ketchel, Note, *Deriving Lessons for the Alien Tort Claims Act from the Foreign Sovereign Immunities Act*, 32 YALE J. INT'L L. 191, 201 (2007) ("While past administrations have invoked the political question doctrine in cases that implicate treaties signed by the United States, the Bush Administration has invoked the political question doctrine in ATCA cases where treaties are not implicated and only a general foreign policy interest exists.").

⁸⁷ 221 F. Supp. 2d 1116 (C.D. Cal. 2002), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), and *withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), and *vacated pending reh'g en banc*, 499 F.3d 923 (9th Cir. 2007). *Sarei* was reversed on appeal, but as discussed below, the Ninth Circuit did not offer a more satisfactory resolution of the doctrinal problems underlying this case. See *infra* Part II.A.3.

⁸⁸ See Baxter, *supra* note 7, at 836 (remarking that the district court in *Sarei* gave "what appears to be conclusive deference to the foreign policy concerns expressed by the State Department").

⁸⁹ Bougainville is a province of Papua New Guinea. CIA – The World Factbook – Papua New Guinea, <https://www.cia.gov/library/publications/the-world-factbook/geos/pp.html> (last visited January 21, 2009).

⁹⁰ *Sarei*, 221 F. Supp. 2d at 1120.

⁹¹ *Id.* at 1181 (citing the executive statement).

⁹² *Id.* at 1208-09. The court also dismissed some claims based upon the act of state and the international comity doctrines. *Id.*

⁹³ Even though courts are very deferential when it comes to the Executive's assessment of how litigation will affect foreign policy, the *Sarei* court took this to an extreme, apparently suggesting the factual basis underlying this assessment could *never* be questioned. *Id.* at 1181-82; see Baxter, *supra* note 7, at 837 (commenting that "[t]he [*Sarei*] court dismissed the case under the political question doctrine, relying conclusively on this statement, while noting that it could not make any assessment of the quality or factual content of the submission"). To this extent, the court was arguably more deferential than most. See *supra* note 23 and accompanying text.

Frumkin, the court then effectively treated these views as being legally dispositive, explaining that:

Were the court to ignore this statement of position, deny the motion to dismiss, and retain jurisdiction over this action, it would surely "express[] lack of the respect for the coordinate branches of government," and cause "the potentiality of embarrassment from multifarious pronouncements by various departments on one question."⁹⁴

Having only vague factors handed down by the Supreme Court in *Baker*, the *Sarei* court was able to offer no additional legal analysis beyond the policy assertions offered by the Executive. And because courts traditionally defer to the President on such policy assertions, the President was effectively given an indirect means of controlling a legal doctrine.⁹⁵ Of course, in the ATCA context there are sound reasons for deferring to the Executive given that the Executive plays an important role in the formation of *substantive* customary international law.⁹⁶ Nonetheless, the court here deferred to the statement while applying the political question doctrine, a doctrine focused on judicial competence and one where such automatic deference seems especially inappropriate.⁹⁷ Ultimately, what was needed was intervention from the Supreme Court to clarify this confusion. Intervene it did; clarify it did not.

C. *Supreme Court Intervention: Sosa and Altmann*

Amidst this ambiguity surrounding the proper role of executive statements, the Supreme Court offered some insight. The first statement by the Court came in 2004 in *Republic of Austria v. Altmann*,⁹⁸ another Holocaust restitution case where the Supreme Court held the Foreign Sovereign Immunity Act ("FSIA")⁹⁹ had retroactive effect.¹⁰⁰ In ruling for the plaintiff, the Court commented upon the amicus curiae submitted by the U.S. government that urged against retroactive application of the statute.¹⁰¹ The Court stated that the government's legal arguments addressing the reach of FSIA were entitled to "no special deference."¹⁰² But it went on to explain that "should the State

⁹⁴ *Sarei*, 221 F. Supp. 2d at 1196-98 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

⁹⁵ See, e.g., Ketchel, *supra* note 86, at 205 ("Under [*Sarei*'s] logic, the President would be able to extinguish almost any claim before a U.S. court by simply asserting that the claim would detrimentally affect U.S. foreign policy since the court apparently would be unable to question such an assertion.").

⁹⁶ See *supra* notes 24-25 and accompanying text.

⁹⁷ Ketchel, *supra* note 86, at 205; cf. Baxter, *supra* note 7, at 821 (explaining that "Chevron deference" is not appropriate in these circumstances).

⁹⁸ 541 U.S. 677 (2004).

⁹⁹ 28 U.S.C.A. § 1330 (2007).

¹⁰⁰ *Altmann*, 541 U.S. at 700.

¹⁰¹ *Id.* at 701.

¹⁰² *Id.* ("The issue now before us, to which the Brief for United States as *Amicus Curiae* is addressed, concerns interpretation of the FSIA's reach – a 'pure question of statutory

Department choose to express its opinion on the implications of exercising jurisdiction over *particular* petitioners in connection with *their* alleged conduct, that opinion might well be entitled to deference as the considered judgment of the Executive on a particular question of foreign policy.”¹⁰³ In so stating, the Court drew attention to the importance of executive statements, but did not explain how much deference lower courts were supposed to grant. This was a question left to lower courts, and it is one with which they have continued to struggle.¹⁰⁴

Just a few weeks later, in *Sosa v. Alvarez-Machain*,¹⁰⁵ the Supreme Court again injected new language into the debate, but again failed to offer much assistance to lower courts. As noted previously, the *Sosa* case was a defeat to the Bush Administration’s attempt to limit the scope of the ATCA.¹⁰⁶ In particular, the Court held that the statute allowed litigants to bring claims based on violations of international law without any additional action on the part of Congress.¹⁰⁷ However, the Court stressed the limited scope of the claims that could be brought. For instance, it remarked in a footnote that one “possible limitation that we need not apply here is a policy of case-specific deference to the political branches.”¹⁰⁸ To illustrate this point with an example, the Court referred to a suit recently brought against corporations that allegedly aided the apartheid regime formerly in place in South Africa.¹⁰⁹ As the Court explained, the governments of both South Africa and the United States submitted statements to the Court arguing that this litigation interfered with the policies underlying South Africa’s Truth and Reconciliation Commission.¹¹⁰ Although offering no specific views on the correct outcome of that litigation, the Court remarked that “there is a strong argument that federal courts should give serious weight to the Executive Branch’s view of the case’s impact on foreign policy.”¹¹¹

construction . . . well within the province of the Judiciary.” (quoting *IRS v. Cardoza-Fonseca*, 480 U.S. 421, 426 (1987)).

¹⁰³ *Id.* at 702.

¹⁰⁴ See *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 69 (2d Cir. 2005) (explaining that *Altmann*, along with *Sosa*, reserved the question of “when, and to what extent . . . the stated foreign policy interests of the United States [should] be accorded deference”); *Separation of Powers*, *supra* note 2, at 2292.

¹⁰⁵ 542 U.S. 692 (2004).

¹⁰⁶ See *supra* notes 81-82 and accompanying text.

¹⁰⁷ *Sosa*, 542 U.S. at 712 (“Although we agree the [ATCA] is in terms only jurisdictional, we think that at the time of enactment the jurisdiction enabled federal courts to hear claims in a very limited category defined by the law of nations and recognized at common law.”).

¹⁰⁸ *Id.* at 733 n.21.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Courts evaluating such executive statements were quick to apply this language in their analyses.¹¹² However, because the Supreme Court's remarks were only dictum, lower courts still had no means of fleshing out what the court meant by "serious weight."¹¹³ Perhaps the most immediate question was whether *Sosa* and *Altmann* were simply reminding lower courts to be vigilant in their application of traditional doctrines of foreign affairs deference, such as the political question doctrine, or whether they were introducing a new "stand alone" doctrine of executive deference.¹¹⁴ The question had no obvious answer, as neither decision specifically referred to justiciability nor to any other specific doctrine.¹¹⁵ However, nearly every court to address the question has decided, either implicitly or explicitly, that *Sosa* and *Altmann* were referring to the traditional practice of using executive statements to inform preexisting doctrines of judicial restraint.¹¹⁶ As the Second Circuit observed in *Whiteman*, even after *Sosa*, the court's "inquiry into the proper deference to be accorded to the United States Statement of Interest is guided by our application of the political question doctrine."¹¹⁷

Nor is there any indication that the Court in either *Sosa* or *Altmann* sought to alter the traditional rule that courts should be the ultimate deciders of legal questions, as neither opinion suggested the President's legal conclusions were entitled to any special weight.¹¹⁸ *Sosa* only said that "serious weight" was due

¹¹² See, e.g., *Sarei v. Rio Tinto, PLC*, 456 F.3d 1069, 1081 (9th Cir. 2006) (concluding that, in its analysis, the Court had given the executive statement "serious weight" (quoting *Sosa*, 542 U.S. at 733 n.21)), *withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), and *vacated pending reh'g en banc*, 499 F.3d 923 (9th Cir. 2007).

¹¹³ See, e.g., *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 78 (D.D.C. 2007) ("[B]ecause such 'case-specific deference' was unnecessary to resolve the issues in both *Altmann* and *Sosa*, the Supreme Court did not flesh out the level of deference owed or indicate just what submissions of the Executive Branch were entitled to heightened deference."); *Separation of Powers*, *supra* note 2, at 2299.

¹¹⁴ See *Separation of Powers*, *supra* note 2, at 2292 (remarking on "the dangers of a new, stand-alone case specific deference doctrine, which would lead to either abdication of . . . judicial function through deference to the Executive at the mere assertion of a foreign policy concern, or determinations so case-specific that they amount to the very type of foreign policy judgments that are constitutionally entrusted to the political branches").

¹¹⁵ See *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 82 (2d Cir. 2005) (Straub, J., dissenting) (observing that "the *Altmann* and *Sosa* majorities never mention justiciability"); Gerald L. Neuman, *The Abiding Significance of Law in Foreign Relations*, 2004 SUP. CT. REV. 111, 141 ("The Court in *Sosa* and *Altmann* did not specify whether it saw the problem in justiciability terms.").

¹¹⁶ See, e.g., *Joo v. Japan*, 413 F.3d 45, 49 (D.C. Cir. 2005); *Beaty*, 480 F. Supp. 2d at 82-86; *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005); *Separation of Powers*, *supra* note 2, at 2297 n.38.

¹¹⁷ *Whiteman*, 431 F.3d at 70.

¹¹⁸ See *Baxter*, *supra* note 7, at 822 (arguing that *Sosa* and *Altmann* did no more than stress that executive statements should be used as evidence to consider in applying doctrines of judicial deference and that such statements were never intended to be legally dispositive).

to the Executive's views on questions of *foreign policy*,¹¹⁹ and *Altmann* quite explicitly stated that the government's views on legal questions "merit no special deference."¹²⁰

So when the dust settled, lower courts were still left with the same problems that *Sarei* and *Frumkin* had to navigate. If anything, *Sosa* and *Altmann* only added urgency to the task of fitting executive statements into the political question doctrine, yet they left open the question as to how this was to be done. Indeed, the decisions that immediately followed *Sosa* and *Altmann* struggled with the same issues their predecessors had, either erring on the side of granting too much deference or none at all.¹²¹

For instance, in *Mujica v. Occidental Petroleum Corp.*,¹²² plaintiffs brought an ATCA suit against an oil company they alleged was involved in the Columbian government's bombing of a village.¹²³ As before, the State Department filed a statement, this time claiming the litigation would damage its relations with Columbia and asking that the case be dismissed.¹²⁴ As with previous cases, the court readily deferred to the statement's representation of U.S. foreign policy interests.¹²⁵ However, in deferring to the policy concerns expressed by the State Department, the court again seemed to defer to the President on what was ultimately a legal determination.¹²⁶ After summarizing the State Department's policy concerns, the court simply stated that "the fourth *Baker* factor applies to the instant case because proceeding with the litigation would indicate a 'lack of respect' for the Executive's preferred approach of handling the Santo Domingo bombing and relations with Colombia in general."¹²⁷ Yet again, the court allowed policy to dictate the application of the political question doctrine. However, in *Sosa*, the Court merely urged that executive statements be given "weight," not determinative legal effect.¹²⁸

¹¹⁹ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

¹²⁰ *Republic of Austria v. Altmann*, 541 U.S. 677, 701 (2004).

¹²¹ *Cf. Separation of Powers*, *supra* note 2, at 2299 (commenting on the "dilemma of either granting full deference or exercising full discretion").

¹²² 381 F. Supp. 2d 1164 (C.D. Cal. 2005).

¹²³ *Id.* at 1168.

¹²⁴ *Id.* at 1169.

¹²⁵ *Id.* at 1194.

¹²⁶ *See Baxter*, *supra* note 7, at 844 (commenting on "the district court's apparent belief that it was required to give unqualified deference to the Administration's preference that the case be dismissed"); Amy Apollo, Comment, *Mujica v. Occidental Petroleum Corporation: A Case Study of the Role of the Executive Branch in International Human Rights Litigation*, 37 RUTGERS L.J. 855, 865 (2006) (explaining that, in applying the *Baker* factors, "the [*Mujica*] court appeared to unquestioningly accept the State Department's statement of interest as dispositive").

¹²⁷ *Mujica*, 381 F. Supp. 2d at 1194.

¹²⁸ *See Baxter*, *supra* note 7, at 822.

In *Hwang Geum Joo v. Japan*,¹²⁹ by contrast, the court implied that executive statements were entitled to virtually no deference. In *Hwang*, several women sued Japan claiming they suffered abuse at the hands of the Japanese army during World War II.¹³⁰ Once more, the Executive requested that the case be dismissed.¹³¹ The court claimed to defer to the statement on this point, but only because "the Executive has persuasively demonstrated that adjudication by a domestic court not only 'would undo' a settled foreign policy of state-to-state negotiation with Japan, but also could disrupt Japan's 'delicate' relations with China and Korea."¹³² A mere "persuasiveness" standard, however, is arguably not deference at all, as the statement is given no more authority than a brief or an amicus curiae. Presumably, *Sosa* meant something more when it called for "serious weight."¹³³ A persuasiveness standard seems to be predicated on the assumption that courts make de novo conclusions regarding the state of U.S. foreign policy, and this seems to conflict with the usual practice of deferring to the State Department on questions of policy.

Therefore, the challenge facing courts in a post-*Sosa/Altmann* world is to "weigh" executive statements in such a way that the President's concerns are given consideration that reflects their importance without allowing such statements to preordain the court's application of a legal doctrine designed to maintain the separation of powers. This task is by no means easy. However, failure to do so can result either in harm to U.S. foreign interests or, conversely, the compromising of the judiciary's integrity. If lower courts are to successfully navigate this Charybdis and Scylla, they must have a standard that is capable of doing so. Most courts have assumed the political question doctrine provides such a standard. As the preceding discussion has suggested, however, its current formulation makes deference to executive statements problematic.

II. RECENT APPROACHES TO EVALUATING EXECUTIVE STATEMENTS AND THEIR LIMITATIONS

In the last two years or so, courts have employed various strategies to give weight to executive statements without allowing them to control the legal outcome of pending cases. In doing so, they have attempted to find an intermediate standard of review that avoids the extremes demonstrated by

¹²⁹ 413 F.3d 45 (D.C. Cir. 2005).

¹³⁰ *Id.* at 46.

¹³¹ *Id.* at 48.

¹³² *Id.* at 52 (quoting the executive statement); see Ketchel, *supra* note 86, at 206 ("While the court accepted the government's request for judicial abstention, it did so only after considering the persuasiveness of the government's argument.").

¹³³ See *Separation of Powers*, *supra* note 2, at 2299 (explaining that deference to executive statements has to be something more than just courts reaching their own foreign policy conclusions).

cases such as those mentioned in Part I. This Part will argue, however, that these attempts have been largely unsatisfactory as they are ultimately too superficial. The mere fact that courts employ these strategies, however, may itself point to the need to reconceptualize the political question doctrine as it applies to human rights litigation.

A. *Approaches to Evaluating Executive Statements*

1. Focusing on Who Submitted the Statement

At least one court has suggested courts should, among other things, carefully consider the identity of the agency that submitted the statement in determining how much deference to give it. In *Beaty v. Republic of Iraq*,¹³⁴ a case brought against the government of Iraq for alleged acts of torture, the court discounted a statement partially because it was submitted by the Justice Department as opposed to the State Department.¹³⁵ As the court explained, “under the fourth *Baker* factor, the level of deference owed a statement of interest filed by the Executive Branch depends on, among other factors . . . who (i.e., which Executive agency) submitted it.”¹³⁶

But focusing on the identity of the agency does not get a court very far. Doing so merely ensures the policy representations of the statements of interest are accurate and authoritative – it does not address the deeper legal question of how, as a matter of law, the statements are to be treated. In other words, it is at best a threshold inquiry that does not really allow courts to engage in any meaningful analysis.

2. Focusing on the Thoroughness and Specificity of the Statement

Courts will also often evaluate the thoroughness and specificity of the allegations made in the statement in determining how much deference to afford it. For instance, in *Beaty*, the court explained that “the deference due a statement filed by the Executive Branch *does* hinge in large part on the thoroughness of the statement and of the representations made therein.”¹³⁷ Similarly, in *City of New York v. Permanent Mission of India to the U.N.*,¹³⁸ the court noted that the government’s statement did not merit dismissal partially because the stated foreign policy concerns were not sufficiently severe, but also because those concerns lacked the requisite “level of

¹³⁴ 480 F. Supp. 2d 60 (D.D.C. 2007).

¹³⁵ *Id.* at 84.

¹³⁶ *Id.*

¹³⁷ *Id.* at 79.

¹³⁸ 446 F.3d 365 (2d Cir. 2006).

specificity" and were too "speculative."¹³⁹ A similar approach has proven popular with recent commentators.¹⁴⁰

A thoroughness and specificity standard, however, is problematic in some regards. Such a standard does little to help flesh out the political question doctrine's substantive requirements and instead places the entire focus upon the policy conclusions offered by the Executive – precisely where courts are least competent to render decisions. The result is a framework that revolves around a document solely within the control and expertise of the President, placing courts in an awkward and vulnerable position.

For instance, courts applying a thoroughness and specificity standard will likely defer too much because such a standard still makes it all too easy for the Executive to potentially manipulate courts. The fact remains that courts do not have access to the evidence available to the Executive.¹⁴¹ Therefore, imaginative executive statements are capable of concocting specific and concrete disaster scenarios that rest on largely dubious factual premises, unbeknownst to courts that lack the expertise to know otherwise.¹⁴² Indeed, some of the Bush Administration's statements have been quite specific despite what is often criticized as a lack of evidentiary foundation.¹⁴³

¹³⁹ *Id.* at 377 n.17.

¹⁴⁰ See Stephens, *supra* note 9, at 775 (stressing that executive statements must "offer explanations that are reasonable, drawing conclusions that are well-founded and supported by the facts"); *Federal Courts*, *supra* note 10, at 438-39 ("[A] legal standard based on the specificity and foreseeability of the cost to the Executive's administration of foreign policy . . . allows the courts to adjudicate cases based on a clear legal standard and precludes the Administration from using its position to stop the litigation of cases it simply does not like.").

¹⁴¹ Julian Ku & John Yoo, *Beyond Formalism in Foreign Affairs: A Functional Approach to the Alien Tort Statute*, 2004 SUP. CT. REV. 153, 194-95 (discussing the Executive's superior ability to collect and analyze information relating to foreign affairs).

¹⁴² Cf. GARY LAWSON, *FEDERAL ADMINISTRATIVE LAW* 591 (4th ed. 2007) ("If courts are going to do anything other than rubber stamp agency decisions in complex cases . . . courts must be prepared to immerse themselves in the technical details of the issues facing the agency.").

¹⁴³ For instance, in *Doe v. Exxon Mobile Corp.*, 393 F. Supp. 2d 20 (D.D.C. 2005), *dismissing appeal*, 473 F.3d 345 (D.C. Cir. 2007), the State Department issued a letter warning that the litigation might offend Indonesia, causing it to withdraw its assistance in the War on Terror. See Stephens, *supra* note 10, at 803 (citing *Exxon Mobil Corp.*, 393 F. Supp. 2d 20; Letter from William H. Taft, Legal Advisor, Dep't of State, to Assistant Attorney Gen. McCallum 3 [hereinafter Letter]). The letter also warned that the "litigation might worsen economic conditions in Indonesia, 'breed[ing] instability' that could 'create problems ranging from interruption in vital shipping lanes, to refugee outflows, to a new home for terrorists' and could also 'impact on the security' of Australia, Thailand, and other countries in the region." *Id.* (quoting Letter, *supra*, at 4-5). The letter further worried that "[a]n economic downturn in Indonesia might also make it difficult for the government to hire the professional personnel it needs to make progress in 'promoting regional stability, countering ethnic and sectarian violence, [and] combating piracy, trafficking of persons,

Courts could perhaps remedy this problem by looking more closely at the Executive's supporting evidence and reasoning, assessing the ultimate credibility of its claims.¹⁴⁴ This approach, however, potentially runs contrary to the traditional rule that executive statements pertaining to policy, and the statements' evaluations of what might harm those policies, are entitled to considerable deference.¹⁴⁵ Indeed, if courts were to undertake an independent examination of the facts and reasoning supporting a statement's conclusions, it is not clear what "serious weight" would still be afforded as courts would in effect just be applying the "persuasiveness" standard seen in *Hwang*.¹⁴⁶ Likewise, courts are poorly equipped to engage in such a factual inquiry. Although they do often exercise a fact finding function, foreign policy is unique in that it is often based on intuition that can only be derived from experience, making it especially hazardous for courts to venture into this field.¹⁴⁷ Therefore, a standard based upon thoroughness and specificity is inherently limited.

3. Focusing on Whether the Statement Specifically Requests Dismissal

Many courts will also look to whether the Executive explicitly requested dismissal on political question grounds. For instance, in *Beaty*, the district court noted deference depended largely upon "whether the Executive supports dismissal of the suit and on what grounds."¹⁴⁸ Likewise, in *Exxon Mobil Corp.*, the D.C. Circuit denied the defendant a writ of mandamus partially because the State Department did not "unambiguously request[] that the district court dismiss a case as a nonjusticiable political question."¹⁴⁹ And in *Sarei*, the Ninth Circuit, which overturned the district court opinion discussed in Part I, discounted the executive statement largely because "[t]he State Department

smuggling, narcotics trafficking, and environmentally unsustainable levels of fishing and logging." *Id.* (quoting Letter, *supra*, at 5). Several commentators have challenged the factual validity of these findings. *See id.* ("Plaintiffs responded to this letter with an expert affidavit debunking the administration's parade of horrors."); *see also* Baxter, *supra* note 7, at 839-40. However, whatever its flaws, the letter was not lacking in specificity.

¹⁴⁴ *See* Stephens, *supra* note 9, at 170 (arguing that "courts are constitutionally obligated to assess the credibility of [the Executive's factual] claims and to reject them where they are not supported by the facts").

¹⁴⁵ *See supra* notes 19-22 and accompanying text.

¹⁴⁶ *See Separation of Powers, supra* note 2, at 2296 (explaining that courts are not supposed to engage in an independent evaluation of foreign policy).

¹⁴⁷ *See* Wash. Post Co. v. U.S. Dep't of State, 840 F.2d 26, 41 (D.C. Cir. 1988) (Bork, J., dissenting) ("[C]ourts do not deal in predictive *political* facts."), *vacated*, 898 F.2d 793 (D.C. Cir. 1970); Ku & Yoo, *supra* note 141, at 194-95 ("[T]he very nature of courts as decision-making institutions may impede their ability to perform a role in foreign affairs.").

¹⁴⁸ *Beaty v. Republic of Iraq*, 480 F. Supp. 2d 60, 79 (D.D.C. 2007).

¹⁴⁹ *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 354 (D.C. Cir. 2007).

explicitly did *not* request that we dismiss this suit on political question grounds."¹⁵⁰

This approach, however, raises certain conceptual problems. Recommending that a suit be dismissed on political question grounds is a legal conclusion and therefore should be of little relevance; the Executive should only express foreign policy concerns and then have the court translate those concerns into an appropriate legal doctrine.¹⁵¹ This confusion has not gone unnoticed by litigants. For instance, in *Beaty*, the defendant objected that *Altmann* warned against deferring to the Executive's legal conclusions, meaning the court should pay no regard to whether the State Department actually requested dismissal.¹⁵² The court replied by reasoning:

[T]he *Altmann* Court . . . reaffirmed that no "special deference" is owed the Executive's views on a pure question of law, but neither said nor hinted that it is improper for courts to focus on whether the foreign-policy concerns that prompt the Executive Branch to express its views are strong enough to lead the Executive also to seek dismissal of the suit.¹⁵³

This response, however, is not satisfactory given that it is unclear why a dismissal recommendation should serve as a proxy to evaluate the strength of the Executive's foreign policy concerns. Again, the Executive should be permitted to inform a court of the foreign policy consequences of litigation without having to express those concerns in the form of a legal doctrine – something that is ultimately the responsibility of the judiciary. In the end, all these courts really seem to have done is add a meaningless technicality to their jurisprudence that offers little by way of actual analysis.

The result, once more, is a framework that is likely to be either too deferential or not deferential enough. It is too deferential because the State Department now need add only one more sentence to each statement requesting dismissal in order to gain considerably more deference, thereby opening the door to potential abuse. Conversely, courts may also find

¹⁵⁰ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1069, 1082 (9th Cir. 2007), *withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), *and vacated pending reh'g en banc*, 499 F.3d 923 (9th Cir. 2007). After a motion for a rehearing was filed, the State Department filed an amicus curiae brief explaining that the circumstances had changed since the lower court's opinion in 2001 and suggesting that dismissal was no longer required. *Sarei*, 487 F.3d at 1206 n.14.

¹⁵¹ *Federal Courts*, *supra* note 10, at 902 ("[A] court should focus on the facts and policy elaborations that the State Department has the expertise to provide and not on its final recommendations.").

¹⁵² *Beaty*, 480 F. Supp. 2d at 80 ("Counsel for Iraq has gamely attempted to downplay the significance of the United States' refusal to advocate dismissal on foreign-policy grounds" by arguing that "courts normally defer to the Executive Branch's exposition of its foreign-policy interests, not to its legal conclusions.").

¹⁵³ *Id.* at 81.

themselves not deferring enough.¹⁵⁴ Indeed, the State Department may very well express legitimate foreign policy concerns that may be discounted simply due to a drafting error.¹⁵⁵ To the degree courts discriminate among different executive statements, they are doing so based on a consideration that is of no legal relevance. Therefore, looking to whether the Executive specifically requested dismissal adds little analytic value.

B. *Unifying Themes and Underlying Problems*

Taken in their entirety, these strategies seem to have one unifying theme: they all focus very intently on the specific text of each individual statement or on the technical manner in which it was submitted. Rather than address broader questions regarding how executive statements should fit into the court's justiciability analysis, courts seem more eager to evaluate the manner in which the statements are presented and the policy predictions made therein.

Such a one-dimensional framework of analysis, however, seems contrary to the Supreme Court's jurisprudence. In *Sosa*, the Supreme Court emphasized that executive statements should be given "serious weight."¹⁵⁶ In doing so, the Court apparently contemplated the statement of interest would be one piece of a broader analysis that would evaluate numerous factors – that is to say, other factors would be "weighed." As the Second Circuit recently reiterated in dicta, the necessary task is to "weigh carefully the relevant considerations on a case-by-case basis."¹⁵⁷ Such nuance, however, seems lacking in the case-law. The courts deciding the cases elaborated above do not engage in any kind of weighing, but rather focus their entire analysis on the text within the four corners of individual executive statements. The result has been a conceptually flawed and pragmatically awkward jurisprudence that seems prone to both over and under deference.

But this then prompts the question of why it is that courts do not engage in the weighing to which *Sosa* refers.¹⁵⁸ The answer may simply be that the *Baker* test, as it is currently formulated, leaves courts with little to weigh.¹⁵⁹

¹⁵⁴ See Jodie Michalski, *Recent Development: The Careless Gatekeeper: Sarei v. Rio Tinto, PLC, and the Expanding Role of U.S. Courts in Enforcing International Norms*, 15 TUL. J. INT'L & COMP. L. 731, 750 (2007) (arguing that in *Sarei*, the Ninth Circuit's "cursory weighing of the [executive statement] clearly ran contrary to the deferential posture mandated by the Supreme Court").

¹⁵⁵ See *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 366 (D.C. Cir. 2007) (Kavanaugh, J., dissenting) (essentially arguing this is what happened in the majority's opinion).

¹⁵⁶ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004).

¹⁵⁷ See *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 263 (2d Cir. 2007) (per curiam) (quoting *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 69 (2d Cir. 2005)), *aff'd for lack of quorum sub nom.* *Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2007).

¹⁵⁸ See *supra* note 112 and accompanying text.

¹⁵⁹ *Whiteman*, 431 F.3d at 83 (Straub, J., dissenting) (explaining that the political question doctrine leaves courts with no "other factors [that] might override the Executive's

Indeed, some courts have come close to suggesting the fourth *Baker* factor is itself defined by the views expressed by the Executive. This phenomenon is nicely illustrated by the Ninth Circuit's decision in *Sarei*. As noted previously, in *Sarei* the court disregarded the Executive's statement largely because it did not explicitly request dismissal.¹⁶⁰ Having done so, the court added a footnote stating that it "need not determine whether a refusal to honor an explicit request to dismiss would constitute sufficient 'disrespect' to warrant dismissal under [the fourth] factor."¹⁶¹ This statement suggests that it is possible that the mere refusal to adhere to an executive statement is itself a "lack of respect" rather than a mere factor to consider. In other words, the court contemplated the possibility that the executive statement did not simply inform the political question doctrine – it potentially *was* the doctrine. So lacking in flesh was the fourth *Baker* factor that a court faced with an executive statement would have no choice but to defer. Left with only this alternative, the court was naturally eager to find some facial reason to avoid giving the executive statement full force, however questionable the validity of that reason may have been.

Therefore, as Part I suggests, the political question doctrine may itself be the underlying source of the problem.¹⁶² Because the fourth *Baker* factor offers courts no external considerations with which to offset executive statements, these statements become a law unto themselves.¹⁶³ Ultimately, the political question framework is such a vacuous standard that once an executive statement enters the picture it effectively subsumes the entire analysis.

This in turn explains why courts have been compelled to dissect the language used in individual executive statements – they are forced to do so by the political question doctrine. Unable to judge executive statements by some external legal standard, courts like the one in *Sarei* are forced to apply a superficial analysis that engages the statement on its face. The only alternatives are to defer blindly to every request for dismissal the court encounters or to ignore executive statements altogether; the political question doctrine lacks the doctrinal tools to do much else.¹⁶⁴ In other words, the

interest"); *Federal Courts*, *supra* note 10, at 903 (arguing the *Baker* factors "lack substance").

¹⁶⁰ See *supra* note 150 and accompanying text.

¹⁶¹ *Sarei v. Rio Tinto, PLC*, 487 F.3d 1069, 1082 (9th Cir. 2007), *withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), and *vacated pending reh'g en banc*, 499 F.3d 923 (9th Cir. 2007).

¹⁶² See *supra* Part I.A.2.

¹⁶³ Cf. *Separation of Powers*, *supra* note 2, at 2298-99 (suggesting that "without the requirement that adjudication conflict with a prior decision of the Executive, a 'lack of the respect due' to the Executive Branch under the fourth *Baker* test could be found any time an executive agency submits a statement of interest claiming foreign policy concerns").

¹⁶⁴ Cf. *id.* at 2292 (arguing that the Second Circuit's application of the political question doctrine in *Whiteman* "introduced the same dilemma [of] . . . either full judicial abdication or unbounded judicial discretion").

flawed approaches described above are really symptomatic of a judiciary which lacks the maneuverability necessary to engage in a genuine analysis.

Therefore, the recent jurisprudence surrounding executive statements is flawed, but its flaws are instructive, pointing towards the need to rethink how the *Baker* test is applied in the foreign affairs context. Interestingly, right after *Sosa*, some suggestions emerged that the political question doctrine might be ill-suited for accommodating executive statements due to its rigidity. Dissenting in *Whiteman*, Judge Straub cautioned that combining deference to executive statements with deference under the political question doctrine resulted in a dangerous “conflation” of two “distinct” doctrines.¹⁶⁵ In particular, Straub worried it would be especially dangerous to evaluate executive statements under the political question doctrine because that doctrine required mandatory dismissal, leaving judges with no “other factors [that] might override the Executive’s interest.”¹⁶⁶

Much like the majority in *Whiteman*, however, courts have generally ignored the warnings of Judge Straub, and instead have continued to use executive statements to inform the political question doctrine without considering the problematic relationship between the two.¹⁶⁷ Nonetheless, the aforementioned cases should prompt courts to rethink the faith they place in this doctrine. Ultimately, if the political question doctrine is to be an effective framework for accommodating executive statements, the *Baker* test may need to be reexamined.

III. RECONCEPTUALIZING THE POLITICAL QUESTION DOCTRINE

As the previous Parts illustrate, the *Baker* test, at least when applied in the realm of foreign affairs, has to be rethought so it can allow courts to respect the policy concerns of the Executive while still permitting a legal analysis that exists independent of these concerns. As this Part will argue, the best way to do this is to incorporate a balancing test into the fourth *Baker* factor whenever the court analyzes foreign affairs questions, a test that could draw some of its substance from the act of state and international comity doctrines.

¹⁶⁵ *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 82-83 (2d Cir. 2005) (Straub, J., dissenting) (“The majority’s conflation of these two doctrines is contrary to the sparse existing precedent on executive deference as an independent ground for dismissal.”); O’Donoghue, *supra* note 1, at 1148 (agreeing with Judge Straub).

¹⁶⁶ *Whiteman*, 431 F.3d at 82-83 (Straub, J., dissenting).

¹⁶⁷ See *supra* notes 114-117; see also *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 263 (2d Cir. 2007) (per curiam) (reiterating that in evaluating executive statements, courts are “guided . . . by ‘our application of the political question doctrine’” (quoting *Whiteman*, 431 F.3d at 69, 71)), *aff’d for lack of quorum sub nom. Am. Isuzu Motors, Inc. v. Ntsebeza*, 128 S. Ct. 2424 (2007).

A. *Advantages of a Balancing Test Generally*

There are several structural advantages to modeling the fourth *Baker* factor as a more fluid balancing test. For one, it seems more consistent with the language in *Sosa* which envisioned some form of "weighing."¹⁶⁸ Also, and perhaps more importantly, a balancing test would allow courts to respect the policy concerns of the Executive while still having other concrete factors that help determine whether those concerns implicate the political question doctrine or merely "touch[] foreign relations."¹⁶⁹ Rather than probing the validity or presentation of the concerns expressed in executive statements, courts could actually explore the legal implications of those conclusions by situating them in a broader legal doctrine. Courts could accept the State Department's representations, but would have other factors available to offset these conclusions.

A balancing test might also promote judicial candor. As it stands, courts are often likely struggling to find technical errors in executive statements in order to evade the constant dilemma of either absolute deference or no deference at all. As the dissent aptly noted in *Exxon Mobil Corp.*, courts are in many ways searching for "hooks" with which to avoid the bipolar choice otherwise presented.¹⁷⁰ If courts had a well developed balancing test, they could dispose of such irrational technicalities and engage executive statements on a more substantive level. This would allow judges to write opinions that offer sensible reasons for not deferring to executive statements rather than arguably contrived ones.

B. *Filling in the Balancing Test: The Act of State and International Comity Doctrines*

The foregoing analysis assumes courts have factors with which to construct such a balancing test. Actually laying out a specific balancing test is beyond the scope of this Note and indeed is something best accomplished over time as courts encounter more cases. However, courts have two sources from which they can at least begin to draw much of the substance needed to allow for construction of a more flexible and robust political question framework: the act of state and international comity doctrines.

1. Act of State Doctrine

The act of state doctrine prevents courts from "inquiring into the validity of the public acts a recognized foreign sovereign power committed within its own

¹⁶⁸ *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004) (arguing that in some cases, "there is a strong argument that federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy").

¹⁶⁹ *Baker v. Carr*, 369 U.S. 186, 211 (1962).

¹⁷⁰ *Doe v. Exxon Mobil Corp.*, 473 F.3d 345, 365-66 (D.C. Cir. 2007) (Kavanaugh, J., dissenting) (referring to the majority's focus on the fact that the Executive had failed specifically to request dismissal of the suit); *see supra* Part II.A.3.

territory.”¹⁷¹ Although the doctrine originally grew out of international law,¹⁷² the modern doctrine is concerned primarily with maintaining the separation of powers.¹⁷³ As the Court explained in *Sabbatino*:

[The doctrine] arises out of the basic relationships between branches of government in a system of separation of powers. It concerns the competency of dissimilar institutions to make and implement particular kinds of decisions in the area of international relations. The doctrine as formulated in past decisions expresses the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder rather than further this country’s pursuit of goals both for itself and for the community of nations as a whole in the international sphere.¹⁷⁴

Although recent Supreme Court jurisprudence has narrowed its scope considerably,¹⁷⁵ the act of state doctrine under *Sabbatino* was traditionally conceived of as a balancing test designed to allow courts to determine when deciding a case would interfere with the Executive’s control over foreign relations. In *Sabbatino*, the Court suggested three such factors: (1) “the degree of codification or consensus concerning a particular area of international law”; (2) whether there are “important . . . implications of an issue . . . for our foreign relations”; and (3) whether “the government which perpetrated the challenged act of state is no longer in existence.”¹⁷⁶ *Sabbatino*, however, refused to promulgate “an inflexible and all-encompassing rule” to govern future decisions and never suggested these factors should be exclusive.¹⁷⁷ Indeed, other decisions have offered additional factors, including “the sensitivity of the issues to national concerns,”¹⁷⁸ “the power of the Executive alone to effect a fair remedy for all United States citizens,”¹⁷⁹ and “whether the foreign state was acting in the public interest.”¹⁸⁰

¹⁷¹ *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 401 (1964).

¹⁷² *See Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 303-04 (1918) (explaining that the act of state doctrine “rests at last upon the highest considerations of international comity and expediency”); *cf.* *Bradley*, *supra* note 19, at 716-17 (describing the Supreme Court’s rejection of “the notion that the [act of state] doctrine was derived from [] international law”).

¹⁷³ *See Bradley*, *supra* note 19, at 717 (describing the Supreme Court’s shift in *Sabbatino* to a “separation-of-powers conception of the act of state doctrine for judicial deference to the Executive Branch”).

¹⁷⁴ *Sabbatino*, 376 U.S. at 423.

¹⁷⁵ *See supra* Part II.A.3.

¹⁷⁶ *Sabbatino*, 376 U.S. at 428.

¹⁷⁷ *Id.*

¹⁷⁸ *First Nat’l City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 788 (1972) (Brennan, J., dissenting).

¹⁷⁹ *Id.*

¹⁸⁰ *Liu v. Republic of China*, 892 F.2d 1419, 1432 (9th Cir. 1989).

The act of state and political question doctrines historically have addressed similar concerns. Like the political question doctrine, the act of state doctrine, at least as it was formulated under *Sabbatino*, seeks to avoid interfering with the President's foreign affairs prerogatives and to this extent it has "constitutional underpinnings"¹⁸¹ similar to those in the political question context.¹⁸² Indeed, the two doctrines are so similar that some courts have even gone so far as to refer to the act of state doctrine as the "foreign counterpart" of the political question doctrine.¹⁸³ Therefore, the various factors underlying the act of state doctrine could provide a valuable means of substantiating a political question balancing test, at least where foreign governments are involved.¹⁸⁴ Indeed, these factors are uniquely calibrated to address concerns that specifically relate to the administration of foreign affairs. Of course, these factors may not always be relevant, but where foreign governments are implicated (which is often the case in human rights litigation), they could at least provide a useful starting point for a political question analysis.

Indeed, in cases where executive statements have been used to apply the act of state doctrine, courts have generally been more successful in giving those statements adequate deference without allowing them to control the court's legal analysis. An executive statement will often be dispositive as to the second *Sabbatino* factor ("implications of an issue . . . for our foreign relations"), but still capable of being offset by other factors.

For instance, as discussed before, in *Mujica* the court dismissed the suit on political question grounds, effectively treating the executive statement as dispositive.¹⁸⁵ Prior to concluding the political question doctrine mandated dismissal, the court first applied the act of state doctrine, balancing many of the above-mentioned factors. As for the question of whether there were "important . . . implications of an issue . . . for our foreign relations,"¹⁸⁶ the court found the statement of interest controlling, thereby concluding that "the second [*Sabbatino*] factor weighs in favor of applying the act of state doctrine."¹⁸⁷ Likewise, although there had been a change in government since the alleged wrong occurred, it was not sufficiently drastic to weigh in the

¹⁸¹ *Sabbatino*, 376 U.S. at 423.

¹⁸² See *Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1289 (N.D. Cal. 2004) (citing *Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1046 (9th Cir. 1983)); Goldsmith, *supra* note 35, at 1396 (explaining that both the act of state doctrine and the political question doctrine are designed to "ensure political branch hegemony in foreign relations").

¹⁸³ *Northrop*, 705 F.2d at 1046.

¹⁸⁴ In fact, the *Sabbatino* Court itself cited *Baker* in articulating the scope of the act of state doctrine. *Sabbatino*, 376 U.S. at 423 ("[I]t cannot of course be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance.'" (quoting *Baker v. Carr*, 369 U.S. 186, 211 (1962))).

¹⁸⁵ See *supra* notes 122-127 and accompanying text.

¹⁸⁶ *Sabbatino*, 376 U.S. at 428.

¹⁸⁷ *Mujica v. Occidental Petroleum Corp.*, 381 F. Supp. 2d 1164, 1194 (C.D. Cal. 2005).

plaintiff's favor.¹⁸⁸ However, as to the first *Sabbatino* factor, the court reasoned there was a considerable amount of international consensus regarding international human rights law.¹⁸⁹ Furthermore, the court found the government of Colombia was not acting in the public interest.¹⁹⁰ Therefore, the court, "[w]eighing these factors," concluded the act of state doctrine did not require dismissal,¹⁹¹ even though the foreign policy concerns expressed in the statement triggered the political question doctrine almost automatically.¹⁹²

In other words, whereas the political question doctrine was vague and conclusory, the act of state doctrine allowed the court to conduct a more thorough weighing analysis without having to question the validity of the statement itself. Therefore, it may be advantageous if courts were to integrate the act of state doctrine into the political question analysis as opposed to applying the two separately.

2. International Comity Doctrine

Under the international comity doctrine, a court will dismiss a case "based upon deference to the laws or interests of foreign sovereigns."¹⁹³ International comity is complicated and multifaceted, often having different meanings in different contexts.¹⁹⁴ As it is used in the context of international human rights litigation, courts generally apply what is referred to as prescriptive comity, whereby they evaluate "the extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act, or by judicial decree, shall be allowed to operate within the dominion of another nation."¹⁹⁵ Should the court conclude, based upon the interests of the foreign nation and the international community, that adjudication would be improper,

¹⁸⁸ *Id.* at 1190-91.

¹⁸⁹ *Id.* at 1190.

¹⁹⁰ *Id.* at 1191.

¹⁹¹ *Id.*

¹⁹² Of course, many courts give the "foreign affairs implication" factor disproportional weight in the balancing analysis, meaning executive statements are often, in effect, controlling. *See Doe I v. Liu Qi*, 349 F. Supp. 2d 1258, 1295 (N.D. Cal. 2004) (describing this factor as the "central factor in the *Sabbatino* analysis"). Indeed, the Restatement counsels that under the act of state doctrine, executive statements will normally be "highly persuasive if not binding." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 443 reporters' note 8 (1987). Nonetheless, cases such as *Mujica* demonstrate that, even if courts will often dismiss cases at the request of the State Department, the act of state doctrine offers courts some ability to engage in an actual analysis.

¹⁹³ *Boyd*, *supra* note 58, at 31.

¹⁹⁴ *See, e.g., Michael D. Ramsey, Escaping "International Comity,"* 83 IOWA L. REV. 893, 893 (1998) (explaining that international comity is "rarely defined with precision").

¹⁹⁵ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1237 (11th Cir. 2004) (citing *Hilton v. Guyot*, 159 U.S. 113, 163 (1895)).

it will normally decline jurisdiction.¹⁹⁶ Comity is not compelled as a matter of law, but rather is discretionary.¹⁹⁷

Unlike the act of state and political question doctrines, international comity does not directly address separation of powers concerns. Rather, it operates more as a guide to federal courts where "the issues to be resolved are entangled in international relations."¹⁹⁸ Some decisions suggest the doctrine requires a "true conflict between domestic and foreign law" as a threshold requirement.¹⁹⁹ Beyond this, the doctrine has become more informal with time, evolving into something of a "reasonableness inquiry," whereby courts will balance a number of different factors in determining the effect the litigation will have on foreign relations more generally.²⁰⁰ In conducting this balancing test, some courts will use factors such as "the interests of our government, the foreign government and the international community in resolving the dispute in a foreign forum"²⁰¹ along with "the adequacy of the alternative forum."²⁰² Other courts have relied upon the more extensive list of factors found in section 403 of the Restatement (Third) of Foreign Relations Law.²⁰³

¹⁹⁶ Boyd, *supra* note 58, at 31. Some jurists have argued that international comity does not go to jurisdiction at all but represents a series of considerations that apply statutory construction. See *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 813 (1993) (Scalia, J., dissenting) (describing questions of comity as a matter of "substantive law").

¹⁹⁷ Boyd, *supra* note 58, at 31.

¹⁹⁸ *Ungaro-Benages*, 379 F.3d at 1237 (citing *In re Maxwell Comm'n Corp.*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

¹⁹⁹ *Hartford Fire Ins. Co.*, 509 U.S. at 798 (citing *Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct.*, 482 U.S. 522, 555 (1987)); Boyd, *supra* note 58, at 32.

²⁰⁰ See, e.g., Boyd, *supra* note 58, at 31-33.

²⁰¹ *Ungaro-Benages*, 379 F.3d at 1238.

²⁰² *Id.*

²⁰³ *Sarei v. Rio Tinto PLC*, 221 F. Supp. 2d 1116, 1199-1200 (C.D. Cal. 2002) (applying Restatement section 403), *aff'd in part, vacated in part, and rev'd in part*, 456 F.3d 1069 (9th Cir. 2006), *and withdrawn and superseded on reh'g in part*, 487 F.3d 1193 (9th Cir. 2007), *and vacated pending reh'g en banc*, 499 F.3d 923 (9th Cir. 2007). These factors include:

- (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
- (b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
- (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
- (d) the existence of justified expectations that might be protected or hurt by the regulation;
- (e) the importance of the regulation to the international political, legal, or economic system;
- (f) the extent to which the regulation is consistent with the traditions of the international system;
- (g) the extent to which another state may have an interest in regulating the activity; and
- (h) the likelihood of conflict with regulation by another state.

Although technically distinct, the international comity doctrine actually embodies many of the same concerns reflected in the act of state²⁰⁴ and political question doctrines. Although a concern with international relations differs from a concern about avoiding interference with the Executive, the two are interrelated insofar as the fourth *Baker* factor is itself focused primarily on the impact that litigation will have upon foreign affairs.²⁰⁵ Therefore, the international comity doctrine can be useful in helping courts to determine whether the concerns expressed by the President merely “touch” upon foreign relations or rise to a level that implicates the political question doctrine.

And again, because the international comity doctrine is structured as a balancing test, courts are able to incorporate executive statements into the international comity analysis without succumbing to the pitfalls of too much or too little deference. For instance, in *Sarei* the district court refused to dismiss the plaintiff’s war crimes and crimes against humanity claims under the international comity doctrine, even though the Executive had submitted a statement stressing adjudication would interfere with foreign relations between the United States and Papua New Guinea.²⁰⁶ The court respected the statement insofar as it established the United States had an interest in deferring to a foreign jurisdiction.²⁰⁷ Nonetheless, the court responded that this alone was insufficient because there was no “true conflict between the laws of the United States and the foreign sovereign.”²⁰⁸ The court also emphasized the international comity doctrine was “discretionary,” explaining that “the court must consider a range of factors, including the character of the activity to be regulated, the importance of regulation to the international community, and the extent to which regulation is consistent with the traditions of the international community.”²⁰⁹ In other words, the multifactor flexibility of the doctrine enabled the court to offset the executive statement with other relevant considerations. By contrast, when the court applied the political question doctrine, absolute deference to the statement was almost a preordained conclusion.²¹⁰

RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987); see Boyd, *supra* note 58, at 31-33.

²⁰⁴ Cf. Jake S. Tyshow, Note, *Informal Foreign Affairs Formalism: The Act of State Doctrine and the Reinterpretation of International Comity*, 43 VA. J. INT’L L. 275, 301 (2003) (“International comity is being invoked by some to compensate for the new, more restrictive formulation of the act of state doctrine, subsuming the underlying concerns of the latter . . .”).

²⁰⁵ See *supra* notes 36-40.

²⁰⁶ *Sarei*, 221 F. Supp. 2d at 1207-08.

²⁰⁷ *Id.* at 1205-06.

²⁰⁸ *Id.* at 1207 n.295.

²⁰⁹ *Id.* at 1207.

²¹⁰ See *supra* notes 93-97 and accompanying text (discussing the *Sarei* court’s application of the political question doctrine).

For that reason, some courts seem more comfortable evaluating executive statements under an international comity as opposed to a political question analysis. For instance, as discussed above, the Eleventh Circuit in *Ungaro-Benages* refused to give any deference to an executive statement when applying the political question doctrine, explaining instead that "we give the executive's statement such deference in our international comity analysis."²¹¹ It is quite possible the court realized the constraints imposed by the political question doctrine and opted for a framework with more flexibility. Still, there is something almost artificial about having to parse through what are largely similar doctrines in such a mechanical fashion. Rather than worrying what doctrinal box an executive statement is placed, it might be wiser to incorporate all of these doctrines into one broader and ultimately richer analysis.

3. Reexamining Foreign Affairs Formalism

As the preceding analysis suggests, the fourth *Baker* factor could better accommodate executive statements if it incorporated aspects of the international comity and act of state doctrines. This is not to say the political question analysis should incorporate both of these doctrines in their entirety. It is just that the factors enumerated in the balancing portions of both doctrines could provide a useful conceptual source with which courts could substantiate the political question doctrine, making it better suited for a world where executive statements are more prevalent.

This suggestion is by no means radical as the lines between these three doctrines have historically been blurred.²¹² Indeed, in *First National City Bank v. Banco Nazionale de Cuba*,²¹³ Justice Brennan, essentially referred to the act of state and political question doctrines interchangeably.²¹⁴ Today, by contrast, the application of doctrines of foreign affairs deference is much more mechanical. Courts often treat these three doctrines as being distinct, normally applying each one separately. For instance, the court in *Mujica* refused to dismiss the case under the act of state doctrine,²¹⁵ but then quickly dismissed the case on political question grounds without inquiring as to the policy goals that underlie these two doctrines.²¹⁶ In other words, there has been a doctrinal stratification. As Lord Wilberforce, a member of the British House of Lords, aptly observed, the general principles underlying foreign affairs deference have

²¹¹ *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1236 (11th Cir. 2004).

²¹² *See Sharon v. Time, Inc.*, 599 F. Supp. 538, 553 (S.D.N.Y. 1984) (commenting on the evolution of an "expanded version of the act of state doctrine"); *cf. Goldsmith, supra* note 35, at 1396 (describing how, prior to the recent era of "new formalism," courts applied foreign affairs deference doctrines in a much more fluid manner, treating them more as "foreign relations effects test[s]" which bore many similarities to one another).

²¹³ 406 U.S. 759 (1972).

²¹⁴ *Id.* at 787-88 (Brennan, J., dissenting); *see Bradley, supra* note 19, at 719.

²¹⁵ *See supra* notes 185-191.

²¹⁶ *See supra* notes 122-127.

become “crystallised” such that “[t]he Nile, once separated into a multi-channel delta, cannot be reconstituted.”²¹⁷ This phenomenon, however, denies the political question doctrine much needed analytical enrichment.

This stratification can be attributed to what Professor Goldsmith has referred to as an era of “new formalism” in the realm of foreign relations law, an era in which courts treat foreign affairs doctrines in a more doctrinal fashion.²¹⁸ The Supreme Court’s decision in *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp., International*²¹⁹ is a good example of this. In *Kirkpatrick*, the Court placed stringent threshold requirements on the act of state doctrine, thereby curtailing the scope of the otherwise fairly open-ended balancing test.²²⁰ In particular, the Court emphasized the act of state doctrine was not a “vague doctrine of abstention” that balanced competing policy goals.²²¹ Rather, the act of state doctrine only applied when a court would be forced to “declare invalid the official act of a foreign sovereign.”²²² To the degree the *Sabbatino* factors were relevant, they could only be considered once this initial determination was made.²²³

The *Kirkpatrick* Court’s desire to avoid a “vague doctrine of abstention” suggests it was wary of courts automatically deferring to executive statements.²²⁴ The Court warned that “[c]ourts in the United States have the power, and ordinarily the obligation, to decide cases and controversies properly presented to them.”²²⁵ As a result, recent commentators who have expressed concern over the judiciary’s often automatic deference to executive statements often cite the *Kirkpatrick* decision.²²⁶ Ironically, however, *Kirkpatrick* is largely and perhaps inadvertently responsible for the doctrinal shift that has made executive statements so problematic for modern courts. One side effect of *Kirkpatrick*’s doctrinaire approach to the act of state

²¹⁷ *Buttes Gas & Oil Co. v. Hammer*, (1981) 3 W.L.R. 787, 804 (H.L.).

²¹⁸ See Goldsmith, *supra* note 35, at 1395.

²¹⁹ 493 U.S. 400 (1990).

²²⁰ See Bradley, *supra* note 19, at 719-20 (describing the Supreme Court’s shift towards a “more rule-like conception” of the act of state doctrine); Goldsmith, *supra* note 35, at 1425 (describing how the Court “significantly curtailed the relevance of inquiries into the foreign relations implications of judicial decisions, and instead embraced a rule-like approach”).

²²¹ *Kirkpatrick*, 493 U.S. at 406.

²²² *Id.* at 405.

²²³ *Id.* at 409. The Court stated:

It is one thing to suggest, as we have, that the policies underlying the act of state doctrine should be considered in deciding whether, despite the doctrine’s technical availability, it should nonetheless not be invoked; it is something quite different to suggest that those underlying policies are a doctrine unto themselves, justifying expansion of the act of state doctrine . . . into new and uncharted fields.

Id.

²²⁴ See Bradley, *supra* note 19, at 720.

²²⁵ *Kirkpatrick*, 493 U.S. at 409; see Bradley, *supra* note 19, at 719-20.

²²⁶ See, e.g., Free, *supra* note 5, at 486.

doctrine is the sharpening of the demarcation lines which separated it from the political question and international comity doctrines.²²⁷ In so doing, the Court left the political question doctrine intellectually starved – cut off from other doctrines which could substantiate it. The result is that the political question doctrine now remains a mere skeletal framework lacking in clear principle and all too vulnerable to the recommendations of the State Department.²²⁸ This in turn has generated the confused and superficial jurisprudence discussed in Part II.

Therefore, if courts are to achieve the kind of principled adjudication to which *Kirkpatrick* aspired, it may be necessary to reevaluate the sharp borders which separate the various foreign affairs doctrines. Indeed, the Supreme Court's decisions in *Sosa* and *Altmann* suggest the Supreme Court has taken a step in this direction. After all, although both decisions spoke of deference to the Executive on a more general level, neither actually identified any of the specific doctrines of foreign affairs deference.²²⁹ Perhaps then, the Court imagined a broader political question doctrine – one which provided courts with ability to engage in a more fluid weighing analysis. If lower courts embraced this vision, they could reinvigorate the political question doctrine, making it capable of providing much needed guidance in a legal environment dominated by executive intervention.

CONCLUSION

In October 2007, the Second Circuit in *Khulumani v. Barclay National Bank Ltd.*²³⁰ quoted *Whiteman* in reiterating that deference to executive statements "should be guided . . . by 'our application of the political question doctrine.'"²³¹ This of course makes deference only as good as the doctrine upon which it relies. However, as the preceding discussion suggests, the political question doctrine may not be up to the task. Rather than allowing courts the flexibility with which to properly weigh executive statements, the political question framework is so doctrinally starved that executive statements become controlling, forcing courts to rely upon considerations that are of questionable analytic value.

If courts are going to respect executive statements while still preserving their constitutional independence, the political question doctrine must have legal significance beyond the mere text of those statements. As this Note

²²⁷ Cf. Tyshow, *supra* note 204, at 301.

²²⁸ Cf. Goldsmith, *supra* note 35, at 1397 (describing how "new formalism" represents a doctrinal shift towards allowing the political branches to have more input in the application of foreign affairs deference doctrines).

²²⁹ See *supra* notes 98-111 and accompanying text.

²³⁰ 504 F.3d 254 (2d Cir. 2007), *aff'd for lack of quorum sub nom.* Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2007).

²³¹ *Id.* at 263 (quoting *Whiteman v. Dorotheum GmbH & Co. KG*, 431 F.3d 57, 70 (2d Cir. 2005)).

proposes, one means of doing so is by incorporating a balancing test into the fourth *Baker* factor, one that draws from the international comity and act of state doctrines. In other words, courts could explore a partial return to the previous model whereby these various doctrines were intertwined. Then perhaps, to paraphrase Lord Wilberforce, the Nile could be “reconstituted.”²³² The factors and considerations that animate various principles of foreign affairs deference could once more flow together, providing courts with a more robust political question doctrine with adequate external standards by which to evaluate executive submissions. Only then can the political question doctrine live up to the expectations that courts such as *Khulumani* have placed upon it.

²³² See *supra* note 217 and accompanying text.